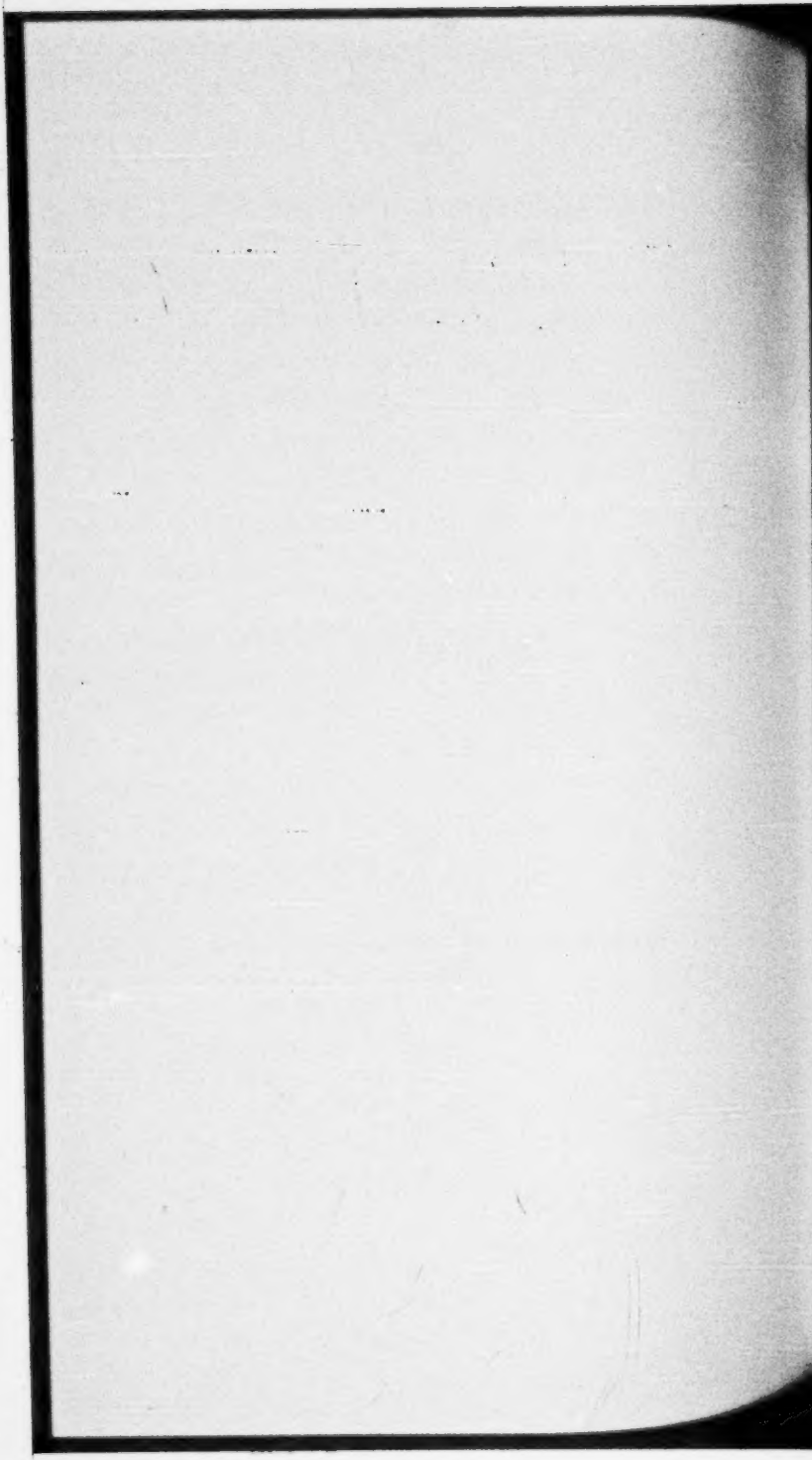

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IN THE

Supreme Court of the United States

October Term, 1972.

No. 72-65.

JOHN B. WHITE, INC.,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE.

On Petition For a Writ of Certiorari to the United States Court of Appeals For the Third Circuit.

REPLY BRIEF FOR PETITIONER TO BRIEF FOR RESPONDENT.

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IN THE

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OCTOBER TERM, 1972.

No. 72-65.

JOHN B. WHITE, INC.,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE.

REPLY BRIEF FOR PETITIONER TO BRIEF FOR RESPONDENT.

This reply brief is necessitated by respondent's misstatement of the question presented in this matter, and its gross misrepresentation of petitioner's position.

ARGUMENT.

The respondent has misstated the question presented in this matter as being solely concerned with the application of Section 118 of the Internal Revenue Code which deals with contributions to the capital of a corporation. Petitioner relies not only on that section, but also on the proposition that the payment in question is a non-taxable capital receipt.

Prior to June, 1954, the only difference in the income tax consequences of a contribution to capital and a capital receipt was that cost or basis was unaffected by the receipt of a contribution to capital, but cost or basis was reduced

by a capital receipt. *In neither instance was any taxable income realized.*

This distinction was eliminated by the enactment of Section 362(c) of the Internal Revenue Code of 1954, which provided:

> "(c) Special Rule for Certain Contributions to Capital.
>
> (1) Property other than money. Notwithstanding subsection (a)(2), if property other than money
>
> (A) is acquired by a corporation, on or after June 22, 1954, as a contribution to capital, and
>
> (B) is not contributed by a shareholder as such, then the basis of such property shall be zero.
>
> (2) Money. Notwithstanding subsection (a)(2), if money
>
> (A) is received by a corporation, on or after June 22, 1954, as a contribution to capital, and
>
> (B) is not contributed by a shareholder as such,
>
> then the basis of any property acquired with such money during the 12 month period beginning on the day the contribution is received shall be reduced by the amount of such contribution . . ."

Since all of the cases cited in the Petition for Certiorari, as well as in respondent's brief in opposition thereto, (except *Federated Department Stores, Inc. v. Comm.*, 426 F. 2d 417) dealt with periods prior to June 22, 1954, the distinction between a contribution to capital and a capital receipt had income tax significance *only* as it related to the basis of property. In none of those cases was

it held, or even contended by the Government, that the payments in question were taxable income.

Thus, in *Detroit Edison Co. v. Commissioner,* 319 U. S. 98 (1943), the issue was whether the payments in question could be included in basis as a contribution to capital, or could not be included in basis as a capital receipt. *The issue was not whether or not the payments were income.* On the contrary, if the payments were income, they could then be included in basis for depreciation purposes just as is contended by respondent in the instant case.

For the reasons stated above, petitioner takes strenuous exception to respondent's allegation that "Petitioner does not challenge the ruling below that the incentive payment it received from Ford was income to it within the broad ambit of Section 61(a) of the Internal Revenue Code of 1954." This flagrant misrepresentation is a clear indication that respondent, recognizing the correctness of petitioner's position, is attempting to distort the issue.

CONCLUSION.

The Court below has decided the issue in this case in direct conflict with the pronouncements of this Court and in erroneous disagreement with other circuits. Unless reviewed by this Court, substantial misconception and confusion will follow.

If allowed to stand, the decision below will subject the petitioner to an unjustified imposition of tax. Certiorari should be granted.

Respectfully submitted,

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